# F.M.S.

**(Appellate Criminal Jurisdiction)**

**Gerahty, J.**

**October 17, 1932.**

**MEGAT IBRAHIM.....Appellant**

**vs.**

**THE BRITISH RESIDENT OF PERAK. SUPERINTENDENT, CONVICT ESTABLISHMENT, TAIPING....Respondents**

**(Perak Criminal Appeal No. 30 of 1932)**

*Habeas Corpus—Chapter XXXVI, Criminal Procedure Code, 1926,—Banishment Enactment 1910, Section 3—Banishment of a natural born subject of a Ruler of a State in the Federation.*

The words "any person in the State" in Section 3 of the Banishment Enactment, 1910, include natural born subjects of the Sultan of that State.

Decision of Gerahty, J. affirmed.

*The Hon. Mr. W. S. Gibson,* Legal Adviser for the British Resident of Perak and the Superintendent Convict Establishment, Taiping. Question before the Court purely one of construction. Right to expel subject, as well as alien, inherent in Sovereign power; arises from duty of State to maintain itself. Not opposed to general principles or natural justice—Coke on Littleton, quoted in Stroud's Judicial Dictionary under heading "banishment." Magna Charta, cap. 29. For modern instance see Hongkong Ordinance 25 of 1917—considered in *Li Mong Hi* v. *Attorney General for Hongkong,* (1920) A.C. 735, and principle upheld. Compare *Yap Hon Chin* v. *Jones Parry,* 2 F.M.S.L.R. 70 at pages 75 and 81.

Modern history full of instances of exercise of this power, e.g. Germany and Spain.

Banishment of subject limited in practice by right of other States to exclude alien, but if other State consents to receive banishee. no infringement of international law or comity of nations. Construction of law not affected by administration difficulties in carrying law into effect.

Banishment Enactment, 1910, is not a new and original Statute; latest in a series; right to banish older than statute: compare Selangor Order in Council of 24th July 1888—banishees from Perak forbidden to enter Selangor. Banishment from Perak first authorised by statute in 1894. Similar Perak legislation preceded first Selangor law authorising banishment— Order in Council 5 of 1894—first of series—applied by preamble to "persons whose presence is inconsistent with the public safety or welfare"—authorises banishment of "any person"—nothing to confine scope to aliens.

Order in Council 3 of 1896 does not affect matter; any inference to be drawn from section 6 of that Order is rebutted by Section 8 of Enactment 10 of 1899.

Enactment 10 of 1899 was first statute to contain provisions as to removal—banishee may be removed to "country of which he is a natural born subject or elsewhere;" special references to persons of Chinese nationality in sections 3 and 4 shew nationality must have been considered by Legislature, but no provisions for exclusion of Perak nationals.

Enactment 8 of 1900 and Federal Enactment of 1909 enact the law without material change.

Banishment Enactment 1910, authorises banishment of "any person in the State"—more emphatic still; preserves power to authorise removal to country of birth or elsewhere.

Enactment 12 of 1918 contemplates banished person being subject of Ruler of State.

No ground for restricted or unnatural construction of general words. Compare Straits Settlements Ordinance No. 153, Banishment: if Legislature had intended to exempt subjects of Ruler it would have definitely said so.

*E. C. Watson* for the Applicants. Such legislation would be contrary to general principles; *Yap Hon Chin* v. *Jones Parry,* 2 F.M.S.L.R. 70 *per* Law, J. at page 75. No subject of a Ruler can be banished to the Colony or to any other Federated Malay State, or outside; banishment inoperative. "Unless it is otherwise specified etc" in section 9 applies where one Ruler banishes from his State the subject of another State in the Federation.

Such legislation against comity of nations; *Yap Hon Chin* v. *Jones Parry,* 2 F.M.S.L.R. 70 *per* Ebden, J at page 81.

Such legislation repugnant to natural justice. To banish a natural born Malay would deprive him of his birth right and make him homeless.

Such legislation contrary to International Law. State of nationality cannot refuse to accept its own subjects; a natural born subject banished from Perak could not be refused admission to Perak if he returned.

The Banishment Enactment, 1910, must be construed strictly because it affects the liberty of the subject. Legislature never intended to include natural born subjects.

*Cur. Adv. Vult.*

**Gerahty, J.**—This is an application by Megat Ibrahim of Kuala Kangsar for an order in the nature of *Habeas Corpus* under Chapter XXXVI of the Criminal Procedure Code, 1926, that he be set at liberty.

The application was made *ex parte* in chambers on the 15th September, 1932. An Order *nisi* was made returnable on 30th September 1932.

The application is supported by the affidavit of Mr. E. C. Watson, Advocate and Solicitor, setting out the facts and deposing that the applicant is a natural born subject of His Highness the Sultan of Perak, that he has been arrested and detained on a warrant of arrest under Section 3 (i) of the Banishment Enactment No. 10 of 1910, that being a natural born subject of the Sultan of Perak the Banishment Enactment is not applicable to him and that therefore he is being detained in the prison at Taiping without just cause and against his will. Further affidavits have also been filed to establish that the applicant is in fact the natural born subject of the Sultan of Perak.

The Legal Adviser has filed:—

(1) An affidavit of the British Resident, Perak, deposing that it appeared to him after such inquiry as he deemed necessary that there were reasonable grounds for believing that the banishment of Megat Ibrahim was conducive to the good of the State and that he did accordingly issue under Section 3 of the Banishment Enactment, 1910, a warrant for his arrest and detention, a copy of which is annexed to the affidavit.

(2) An affidavit by the Chief Police Officer in proof of the arrest of the applicant.

(3) An affidavit by the Gaoler, Convict Establishment, Taiping, in proof of detention of the applicant in the Convict Establishment, Taiping.

On 30th September 1932, The Legal Adviser (Mr. Gibson) appeared to shew cause on behalf of the Respondents, the British Resident, Perak, and the Superintendent, Convict Establishment, Taiping.

Mr. E. C. Watson appeared on behalf of the applicant.

The question raised is whether the provisions of the Banishment Enactment, 1910, are applicable to a natural born subject of a Ruler of a State in the Federation for the purposes of banishment from that State?

The power to banish is contained in Section 3 of the Banishment Enactment, 1910, as amended by Enactment 24 of 1923 and Enactment 11 of 1928 and reads as follows:—

> (3) (i) "Whether it shall appear to the Resident of any of the Federated Malay States after such inquiry or such written information as he may deem necessary that there are reasonable grounds for believing that the banishment from the State of any person in the State is conducive to the good of the State or of any other Malay State or that it is expedient that such person be required to execute a bond for his good behaviour the Resident shall issue an order for the arrest and detention, or if he is already in prison for the detention, of such person and shall lay before the Ruler of the State a written statement of the grounds upon which it so appears to him, and the Ruler of the State may thereupon, with the advice and consent of the Resident, order that such person be banished from the State, or may with the like advice and consent order that such person do before a day to be named in the order execute a bond with sureties for his good behaviour in such amount and for such period as may be fixed by such order.
>
> (ii) "Banishment under this Section may be either for the life of the person or for a term to be stated in the order.
>
> (iii) "If any person ordered to give security for his good behaviour under the provisions of this Section does not give such security, to the satisfaction of the Resident, before the day named in that behalf in the order or such later day as the Resident may appoint, he shall be banished from the State for such period as the Ruler of the State with the advice and consent of the Resident, shall think fit."

The question before me resolves itself into one of construction. The enabling power is contained in the section set out above, that power *prima facie* extends to banishment from the State of "any person in the State," and having regard to the scope and object of the Enactment the function of this Court is to examine its provisions generally to ascertain whether the generality of the words "any person of the State" is in any way qualified or limited to a particular class of persons.

Counsel for the applicant has argued that the banishment of natural born subjects of a State from the land of their birth is contrary to general principles, that it is against the comity of nations, contrary to international law, repugnant to general justice and against Malay custom.

In regard to the latter there is no evidence before the Court and my attention has not been directed to any authority on International Law to show in which respect the banishment of natural born subjects offends against the principles of International Law or is against the comity of nations. It must, however, be acknowledged, I feel, that the powers which it is contended have been conferred upon the Rulers of the Federated Malay States enabling them to deport their natural born subjects are almost unique and without precedent in modern days.

In the Colony by the Banishment Ordinance No. 153, the natural born subjects of His Majesty have been expressly excluded. The long title of that Ordinance runs as follows:—

> "To consolidate the law relating to the banishment of aliens".

The closest analogy to which my attention has been directed would appear to be the Hong Kong Deportation Ordinance 1917, which empowers the Governor in Council to make deportation orders against natural born British subjects in certain cases. Proceedings under that Ordinance were the subject of an appeal to the Privy Council in the case of *Li Hong Mi* v. *Attorney General for Hong Kong and others*, (1920) A.C. 735, and in the course of his judgment Viscount Haldane remarks that—

> "Although Hong Kong is a Crown Colony and the provisions of the Ordinance affect materially the rights of British subjects as they would be under the Common Law of England, there is no doubt as to the validity of these provisions and the Ordinance enacting them."

At page 738 he states further that "The real question on the appeal is whether the order made against the appellant conformed to the procedure directed by the Ordinance itself".

Now in the Federated Malay States the supreme legislative authority would appear to be vested in the Federal Council which by clause 10 of the agreement of 1927 is empowered "to pass all laws intended to have force throughout the Federation", and thus is fully empowered to legislate freely subject to the assent of the four Sultans.

No question, therefore, can arise as to whether the Banishment Enactment is *ultra vires*. This aspect of the case has been dealt with at some length in the judgment of Law, C.J.C. and Ebden, J.C. in *Yap Hon Chin* v. *Jones Parry*, 2 F.M.S.L.R. 70, at pp. 72-75 and 81-84. In that case it was held by the Court of Appeal that the extraterritorial powers conferred by the Banishment Enactment, 1900, are not *ultra vires*.

In *Public Prosecutor* v. *Wah Ah Jee*, 2 F.M.S.L.R. 193, at p. 195, Earnshaw, C.J.C. states:—"The Courts here must take the law as they find it expressed in Enactments. It is not the duty of a Judge or Magistrate to consider whether the law so set forth is contrary to International Law or not".

I do not consider it to be within the province of this Court to speculate on the intention of the legislature in framing this enactment or to construe it according to my own notions of what the language of this Enactment means and not what the legislature meant or may have meant.

In *Palmer* v. *Thatcher*, (1878) 3 Q.B.D. 346, at p. 353, Cockburn, C.J. states:—

> "We must consider what the Acts of Parliament to which we have been referred actually say, and not enter upon some remote speculation as to what the legislature intended."

It is in my opinion an enactment which affects the liberty of the subject and encroaches on the rights of the subject.

In Maxwell on the Interpretation of Statutes, 6th Edition at p. 501, it is stated that "Statutes, which encroach on the rights of the subject, whether as regards person or property are similarly subject to a strict construction in the sense before explained. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights. It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that if such be its intention, it will manifest it plainly, if not in express words, at least by clear implication, and beyond reasonable doubt".

Again at page 500 it is stated:

> "The effect of the rule of strict construction might almost be summed up in the remark, that where an equivocal word or ambiguous sentence leaves reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of the doubt should be given to the subject, and against the Legislature which has failed to explain itself."

I will return now to the words "Any person in the State" in Section 3 (i) of the Banishment Enactment These words to quote Elphinstone, C.J. in *Ho Chik Kwan* v. *Public Prosecutor* (1931-1932) F.M.S.R. 271, 283 "Construed literally, would include all persons whether subject of the banishing State or not".

In construing these words it is helpful to trace back and to examine the provisions of the previous legislation in relation to Banishment and to ascertain whether power to banish existed and if so whether it was at any time limited to any particular class of persons, and whether the Banishment Enactment, 1910, was intended to alter the law or to leave it exactly as it stood before. See *In re a Debtor*, (1903) 1K.B. 705, at p. 710 *per* Cozens-Hardy, L.J.

I understood the Legal Adviser in the course of his arguments to refer to a certain Treaty with the East India Company in 1827 in which the right to banish from Perak was asserted. I regret I have not a copy of this before me. Perhaps the Legal Adviser was referring to "The Supplementary Engagements of the Rajah of Perak," contained in a letter addressed The Agent, Captain James Low, dated 25th October, 1826. The sixth paragraph provides that "H.M. the King of Perak will drive out of his country any person convicted of having carried off cladestinely or by force, from any British possession, any subject of, or person living under the British Government."

He also referred me to Selangor Order in Council of July 24, 1888 which makes provision for prohibiting persons banished from the Straits Settlements from entering Selangor, and to Perak Order in Council of 1893 containing similar provisions.

By Perak Order in Council No. 5 of 1894 power is given to the Sultan in Council "after such inquiry as he may deem necessary, that the removal from the State of any person is necessary for the public safety or welfare", to issue an order banishing such person from the State. This would appear to be an admission on the part of the legislature of the right of the Ruler to banish his own subjects.

This Order in Council is followed by the Perak Banishment Extension Order No. 3 of 1896 and Section 3 and Section 6 are of importance as they may be read as casting a doubt upon the apparent generality of the power given in the preceding Order in Council, or on

the other hand they may, in my opinion, be more consistently construed as referring solely to the banishment of natural born subjects of the Sultan of Perak from the Colony or other States.

Section 3 enacts that

> "All persons lawfully banished from the Colony, from Johore or from any native State, and not being natural born subjects of the Sultan of Perak, are hereby prohibited from entering or residing in the State of Perak."

Section 6 is worded as follows:—

> "If any question shall arise in any proceeding under this Order in Council as to whether any person is or is not a natural born subject of the Sultan of Perak, the onus of proving that such person is a natural born subject of the Sultan of Perak shall be upon such person"

Next follows Perak Enactment No. 10 of 1899 which repeals the Orders in Council of 1894 and 1896. It is an enactment to consolidate and amend the law relating to banishment. Section 4 of this enactment provides for banishment from the State of two classes of persons:—

(a) "Any persons" where necessary for the safety, peace, or welfare of the State and

(b) Any person being a president, manager, or headman of, or otherwise taking a prominent part in any unlawful society.

Section 5 (iii) provides that the order of banishment shall be carried into effect by the banished person being placed on board a ship for removal to "the country of which he is a natural born subject, or elsewhere in such manner and way as the Deputy Commissioner directs".

Section 8 provides that "All persons lawfully banished from the Colony, from Johore or from any one of the Federated Malay States are hereby prohibited from entering or residing in the State of Perak during the period of their banishment". Special provisions are made in regard to persons of Chinese nationality who are defined in Section 3. Here again it would appear that the power to banish given by Section 4 (i) (a) is general and includes the natural born subjects of the State.

The words "or elsewhere" in Section 5 (iii) which appear for the first time must, in my opinion, be read as applying to such cases. It is significant that the provisions of Sections 3 and 6 of the Banishment Extension Order No. 3 of 1896, or anything resembling them, have been omitted as the question of nationality was presumably under the consideration of the Legislature in framing and passing this Enactment.

Perak Enactment No. 8 of 1900 repeals and re-enacts the Banishment Enactment, 1899, with some slight amendments which are not material to this case.

We then come to the Federal Enactments the first of which was the Banishment Enactment, 1909, containing powers to banish similar to those conferred by Section 4 of Perak Enactments Nos. 10 of 1899 and 8 of 1900, and which has been repealed by the present Banishment Enactment No. 10 of 1910.

A study of the various Orders in Council and Enactments prior to the Federal Ordinances show to my mind quite clearly that, so far as the State of Perak is concerned, banishment, including the right of banishment of the natural born subjects of this State, has been recognised, and from time to time given effect to, by the Legislature.

In framing the Banishment Enactment of 1910 the Draughtsman, and indeed the Legislature, were not dealing with new subject matter and it now remains to be considered whether from the language used that enactment perpetuates or derogates from the rights hitherto conferred upon the Ruler of the State in regard to the banishment of his natural born subjects.

Is there anything in that Enactment which qualifies the literal meaning of the words "any person in the State" in Section 3 (i) ?

In this connection Section 8 (ii) requires careful consideration. The aim and object of this section is the provision of machinery for giving effect to an Order of Banishment made under the provisions of Section 3. It provides for the conveyance and custody of a banished person by railway and ship to a port of the Federated Malay States or of the Colony for removal thence, "to the country of which he is a natural born subject, or elsewhere if so stated in the warrant, in such manner as the Chief Police Officer shall direct. The ship in which the banished person is conveyed in custody under this Section, shall, unless the banished person is a subject of any of the Rulers of the F.M.S. be a ship belonging to the said Rulers or to any of them or to His Britannic Majesty or to any of their respective subjects."

It has been suggested that this section contemplates that the banished person would not be the natural born subject of the banishing State as such a subject could not be conveyed to the country of which he was a natural born subject, I am, however, not of that opinion for it appears to me that the words "or elsewhere" have the same meaning as in Section 5 (iii) Perak Enactment No. 10 of 1899, to which I have previously made reference herein, and must be read as referring to the conveyance and destination of natural born subjects of the banishing State, otherwise they would be in derogation of the right, sought to be safe-guarded by the section, of a banished person to be removed to the country of which he is a natural born subject where such country is other than the banishing State.

It is to be observed that throughout this Section reference is made to "banished persons" and thus the Section only applies where the powers conferred by Section 3 have already been exercised and cannot, in

my opinion, be read as derogating from those powers. As I read the Section its purport is to direct the Executive how to carry into effect an Order of Banishment where the banished person is the natural born subject of another country. It is obvious, I think, that it would not have been practicable to lay down detailed directions for the conveyance of natural born subjects of the banishing State, as such must necessarily in each case be the subject of administrative arrangements with other countries or with other Malay States.

I would observe also that under Section 9 the prohibition of any banished persons from any Malay States from entering or residing in any of the Federated Malay States is relaxed where "it is otherwise specified in the Order of Banishment", which, when read together with Section 8 (ii), above referred to, confirms me in the meaning which I would attach to the words "or elsewhere", namely, as referring to the destination of a natural born subject of the banishing State. The procedure and penalty clause Section 10, has also been modified accordingly.

In *Ho Chik Kwan* v. *Public Prosecutor* (1931-1932) F.M.S.L.R. 271, Elphinstone, C.J. takes the view that the words "unless the banished person is a subject of any of the Rulers of the F.M.S." might refer to the case where a natural born subject of a State is banished by the Ruler of another State. It seems to me, however, that those words having regard again to the generality of the power given in Section 3 may, equally consistently, be construed to refer to the banishment "elsewhere" of a natural born subject of the banishing State.

The learned Chief Justice, although the point was not one upon which he was called upon to decide in the proceedings before him, expresses the view that those words nevertheless are "almost conclusive" that the Banishment Enactment does apply to the subjects of the banishing State and he arrives at the conclusion that on the whole he "is satisfied that there is nothing in the Enactment which justifies a departure from the ordinary and literal meaning of the words banish' and 'any person' and that consequently the Ruler of a State has power to order the banishment of his own subject"

This point was not considered in the Court of Appeal in the same proceedings. In that appeal the main point before the Court was the competency of the Court to investigate in view of the provisions of Section 373 of the Criminal Procedure Code, and it was held that the Resident of a Federated Malay States is vested with powers of arrest and detention under the Banishment Enactment. That before those powers could be exercised he is bound to take the preliminary steps necessary for the creation of those powers. That once it is satisfied that these steps have been lawfully taken, the Court is *functus officio*. It follows in my view, that none of the required steps can be lawfully taken in respect of any person who is not in fact a person to whom the Banishment Enactment applies. Therefore the question whether a particular person is or is not a person to whom the Enactment applies is one which must be entertained by the Court.

To revert, the fact that other constructions might be placed upon the words "or elsewhere" or the words "unless the banished person is a subject of any of the Rulers of the F.M.S.", as employed in Section 8, would not in my opinion, justify me in departing from the ordinary and literal meaning of the words "any person in the State", unless the construction which I hold should be given to the former words is inconsistent or ambiguous or leaves a reasonable doubt when construed with the latter words as used in Section 3 of the Enactment. In my view there is no such inconsistency, ambiguity or doubt and accordingly I am of opinion that the applicant has failed to satisfy me that he is not a person to whom the Banishment Enactment is applicable or that any of the necessary preliminary steps conferring the right upon the Resident to exercise his statutory powers under the Enactment have not been lawfully taken.

The order *nisi* is therefore discharged and the application stands dismissed with costs.

The Applicant appealed and the appeal was heard on the 28th November 1932.

*E. C. Watson* for the Appellant relied on the arguments advanced in the Court below.

*The Hon. Mr. W. S. Gibson*, Legal Adviser, was not called upon.

The Court of Appeal, consisting of Thorne, Acting C.J., Prichard, J. and McFall, J., dismissed the appeal.

*Appeal dismissed.*